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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,) No. CR-08-0237-MHP
)
Plaintiff,)
)
vs.)
) Date: November 17, 2008
DAVID NOSAL, et al.,) Time: 11:00 a.m.
) Courtroom: Honorable Marilyn Hall Patel
Defendants.)
_____)

**REPLY BRIEF IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS INDICTMENT AND RECUSE
GOVERNMENT COUNSEL**

PREFATORY NOTE

Before turning to the government's opposition to defendant Nosal's motion to dismiss the indictment and to recuse AUSA Kyle Waldinger from further participation in Mr. Nosal's prosecution, the defendant must take notice of the extraordinary pleading in support of the government's opposition filed by Becky Christian, who has pled guilty to charges against her and whom the government intends to call as a witness against Mr. Nosal. Despite the fact that Ms. Christian is not a party to the prosecution of Mr. Nosal by the United States, she has submitted a brief arguing that Mr. Waldinger must be maintained as the defendant's prosecutor.

Ms. Christian has no cognizable legal interest in the question of whether the indictment against Mr. Nosal must be dismissed or whether Mr. Waldinger should continue as a prosecutor against Mr. Nosal. Any decision on these questions cannot affect Ms. Christian's own case, as the conflict of interest under consideration arises from United States Attorney Russoniello's role as Mr. Nosal's past counsel, an issue that has nothing to do with Ms. Christian's prosecution. Ms. Christian's suggestion that the Court, in deciding the conflict of interest issue, should be influenced by whether Ms. Christian might have to undergo a "re-interview" (Christian Brief, at 3) is preposterous.

Ms. Christian has no standing to be heard on the questions now before the Court. As discussed below in Section C, however, the fact that she felt impelled to defend and advocate for Mr. Waldinger's continued presence in the case does raise new doubts as to whether he can serve impartially in this matter.

A. Source of Law

The differing positions taken by the defendant Nosal and the government in this matter are largely a function of the different legal authorities on which they rely. It is thus necessary to clarify the source of law — which legal authorities are binding, and which are persuasive.

The government is correct that the Northern District has adopted the California Rules of Professional Conduct. The government is correct that the relevant governing rule — the legal rule which is binding — is California Rule of Professional Conduct 3-310. The government is also correct that Rule 3-310, by itself, does not answer the question of whether and to what

1 extent an individual prosecutor's conflict is imputed to the remainder of a prosecutor's office.
 2 Thus, this Court must turn to other authorities to determine how to interpret that rule.

3 The government turns to the ABA Model Rules. The government is correct (as Mr.
 4 Nosal fully conceded in his motion) that the ABA Model Rules do not require an individual
 5 prosecutor's conflict to be imputed to the remainder of the prosecutor's office. The government
 6 is also correct that the ABA Model Rules may be consulted as a source of "persuasive
 7 authority." (*See* Govt. Memorandum at 6.)

8 But the ABA's Model Rules are not the only source of persuasive authority. The ALI's
 9 Restatement (Third) of the Law Governing Lawyers, for example, is another source which this
 10 Court may consult. Indeed, it has been repeatedly cited as persuasive authority by both the Ninth
 11 Circuit, *see, e.g., Brown & Bain, P.A. v. O'Quinn*, 518 F.3d 1037, 1041 (9th Cir. 2008); *United*
 12 *States v. LaPage*, 231 F.3d 488, 492 n.15 (9th Cir. 2000), and California state courts, *see, e.g.,*
 13 *Fletcher v. Davis*, 33 Cal. 4th 61, 70 (2004); *Zurich American Ins. Co. v. Superior Court*, 155
 14 Cal. App. 4th 1485, 1499-1500 (2007).

15 In fact, and most importantly, California state courts have specifically relied on the
 16 Restatement when interpreting Rule 3-310. *Faughn v. Perez*, 145 Cal. App. 4th 592, 605 (2006);
 17 *Farris v. Fireman's Fund Ins. Co.*, 119 Cal. App. 4th 671, 680-81 (2004). The Restatement thus
 18 has just as much claim to the title "persuasive authority" as do the Model Rules.

19 But just as legal ethics scholars have disagreed on the issue of imputation in the
 20 government context, the Restatement and the Model Rules also differ on the issue.¹ While the
 21 Model Rules do not recommend imputing conflicts to entire prosecutor's officers, the
 22 Restatement does. Illustration 4 to Restatement § 123 describes its recommended application:

23 4. Assistant Prosecutor A, who has recently joined a county
 24 prosecutor's office, represented Defendant at a preliminary hearing
 25 in a pending criminal case while in private practice. Because A
 would be prohibited from prosecuting Defendant at trial in the
 same matter (see § 132), under the rule of imputation described in

26
 27 ¹ For a discussion of the differing approaches taken by the Restatement and the Model
 28 Rules, see Geoffrey Hazard et al., *The Law and Ethics of Lawyering* 513-14 (4th ed. 2005) ;
 Charles W. Wolfram, *Modern Legal Ethics* § 7.6.5 (1986).

1 this Section, ordinarily no other member of the same county
2 prosecutor's office could conduct the prosecution. A special
3 prosecutor or a prosecutor from an adjoining but jurisdictionally
4 distinct county ordinarily could act. If state law does not permit
appointment of such other prosecutors, however, screening
measures such as those described in § 124(2) can suffice to permit
the prosecution to proceed.

5 In Mr. Nosal's case, there is no reason why a special prosecutor or prosecutor from an
6 adjoining district could not be appointed (nor is there any relevant law forbidding such an
7 appointment). Indeed, a prosecutor from Washington has already been appointed to head the
8 Nosal prosecution. Thus, if this Court follows the Restatement approach, it would be required to
9 disqualify AUSA Waldinger.

10 The government also argues that the non-California cases cited by Mr. Nosal in his
11 motion should not be considered because they are "inapplicable." (Govt. Memorandum at 16-
12 17.) If by "inapplicable" the government means "not binding," then of course Mr. Nosal
13 concedes the point. But, as always, authority from other jurisdictions, though not precedential,
14 may constitute persuasive authority. When deciding difficult ethical questions like this one,
15 federal courts look not only to the California Rules but also to other "state and federal cases."
16 *In re Grand Jury Investigation of Targets*, 918 F. Supp. 1374, 1377 (S.D. Cal. 1996). California
17 courts themselves look to non-California cases to help interpret Rule 3-310. *See, e.g., Dept. of*
18 *Corporations v. Speedee Oil Change Systems*, 20 Cal. 4th 1135, 1150-52 (discussing non-
19 California cases). There is no reason why this court may not do the same; indeed, Nosal
20 submits that such judicial decisions are more persuasive than the ABA Model Rules.

21 In sum, Rule 3-310 does not by itself answer the question faced by this Court, so this
22 Court must look elsewhere for guidance. The government cites the persuasive authorities that
23 support its position and ignores the contrary authorities — it cites and discusses the ABA Model
24 Rules, for example, but entirely ignores the Restatement. Mr. Nosal more candidly admits that
25 there is persuasive authority pointing in both directions. The task for this Court is to consult the
26 various competing arguments and determine what the most appropriate course is in this
27 circumstance. Mr. Nosal's argument is that on balance, and taking into account all of the
28 relevant persuasive authority, AUSA Waldinger should be disqualified because Mr. Russoniello

1 has supervisory authority over him.

2 **B. The Effect of Cal. Penal Code § 1424**

3 The government argues that Cal. Penal Code § 1424 requires that this Court deny Mr.
4 Nosal's motion to recuse. It is unclear what role § 1424 should play in this Court's
5 determination. That statute is not part of the California Rules of Professional Conduct, and it has
6 not been incorporated into the Northern District's Local Rule governing attorneys, so it is not
7 binding here. But in any event, § 1424 does not say what the government claims it says.

8 The government argues that under § 1424, courts may disqualify prosecutors only when
9 there is an *actual* conflict of interest — it argues that the *appearance* of conflict does not suffice.
10 To support that argument, the government quotes several statements from California court cases.
11 When read out of context, those statements appear to support the government's contention.
12 When the relevant passages are presented in full, however, it is clear that the California Supreme
13 Court has explicitly rejected the government's interpretation of § 1424.

14 The truth of the matter is that under California law, following the enactment of § 1424,
15 there is simply no distinction between actual and apparent conflict. Shortly after the California
16 Legislature enacted that provision, the California Supreme Court explained its significance:

17 In 1980 the Legislature enacted section 1424, which provides, in
18 relevant part, "The motion [to recuse] shall not be granted unless it
19 is shown by the evidence that a conflict of interest exists such as
20 would render it unlikely that the defendant would receive a fair
21 trial." This standard differs from that enunciated by us in *Greer*.
22 While section 1424 does not specify whether the disqualifying
23 conflict must be "actual" or need only generate the "appearance of
24 conflict," in either event, the conflict must be of such gravity as to
25 render it unlikely that defendant will receive a fair trial unless
26 recusal is ordered.

27 *Several factors in combination persuade us that the section*
28 *contemplates both "actual" and "apparent" conflict when the*
presence of either renders it unlikely that defendant will receive a
fair trial. Traditionally, conflicts raised in varied contexts have
involved both actuality and appearance. Further, the legislative
history of section 1424 reflects concern about the effects of the
elimination of the "appearance of conflict" standard. While it is
conceivable that an "appearance" of conflict could signal the
existence of an "actual" conflict which, although prejudicial to the
defendant, might be extremely difficult to prove, we think that the
additional statutory requirement (that a conflict exist such as
would render it unlikely that the defendant would receive a fair

trial) renders the distinction between "actual" and "appearance" of conflict less crucial.

. . . In our view a "conflict," within the meaning of section 1424, exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner. *Thus, there is no need to determine whether a conflict is "actual," or only gives an "appearance" of conflict.*

People v. Conner, 34 Cal. 3d 141, 147 (1983) (emphasis added); *see also People v. Eubanks*, 14 Cal. 4th 580, 591 (1996) (stating that § 1424 "does not explicitly require an 'actual' conflict, nor does it explicitly exclude 'apparent' conflicts."); *People v. Lopez*, 155 Cal. App. 3d 813, 824 (1984) ("Because the statutory language is ambiguous, the 'appearance' factor may still be a relevant consideration.").

In short, the government's claim that § 1424 only allows disqualification for "actual" conflicts is simply false. Even after the enactment of § 1424, the California Supreme Court has continued to support a rule of full imputation where the circumstances require it. In fact, in both *Connor* and *Eubanks* — the two post-§ 1424 cases on which the government most heavily relies — the California Supreme Court actually *upheld* the disqualification of prosecutors despite the defendants' inability to prove any actual prejudice.

In *Conner*, the Court affirmed the recusal of the entire Santa Clara District Attorney's office in a case where one line prosecutor was conflicted due to his status as a witness:

It is reasonable to conclude that an apparent threat to one deputy coupled with his witnessing the serious injury actually inflicted on the deputy sheriff during the same course of events may well prejudice the coworkers of [the prosecutor] and the deputy sheriff. While it may be difficult, if not impossible, to prove that a bias of the DA's office will *definitely* affect the fairness of a trial, the trial court is in a better position than are we to assess the likely effect of the shooting incident. We will not disturb the court's conclusion that the DA's discretionary powers exercised either before or after trial (e.g., plea bargaining or sentencing recommendations), consciously or unconsciously could be adversely affected to a degree rendering it unlikely that defendant would receive a fair trial.

Id. at 148-49 (emphasis in original).

In *Eubanks*, the Court similarly affirmed a disqualification order. It held that while the mere "perception of improper influence" was not *sufficient* to mandate disqualification under §

1 1424, such a perception was nonetheless *relevant*: “That our analysis focuses on actual
 2 likelihood of prejudice, however, should not be taken as suggesting the potential for loss of
 3 public confidence in the criminal justice system is either unimportant or unimaginable.” 14 Cal.
 4 4th at 593. It clarified, moreover, that the focus of the inquiry is not on “actual prejudice” but
 5 rather “actual *likelihood* of prejudice,” and it held that such likelihood exists “whenever there is
 6 a *reasonable possibility* that the DA’s office may not exercise its discretionary function in an
 7 evenhanded manner.” *Id.* at 594 (emphasis added).

8 In this case, as in *Connor*, while there is admittedly no way to “definitely prove”
 9 Waldinger’s bias, it is reasonable to conclude that Russoniello’s supervisory authority might
 10 cause bias. It is reasonable to conclude that Waldinger’s impartial discretionary authority
 11 “consciously or unconsciously could be adversely affected” by the relationship with his boss.
 12 *Connor*, 34 Cal. 3d. at 149. And in this case, as in *Eubanks*, there is a “reasonable possibility”
 13 that AUSA Waldinger’s ability to exercise his discretionary functions in a fully impartial manner
 14 have been compromised. 14 Cal. 4th at 594.

15 In short, even under § 1424, disqualification is warranted.

16 **C. Proving Actual and Apparent Conflict**

17 The government argues that there is a sharp and legally salient distinction between actual
 18 and apparent conflicts, and that Mr. Nosal has made no specific allegations of an actual conflict.
 19 (Govt. Memorandum at 19 & n.6.) As noted above, under California law, there is no sharp
 20 distinction between actual and apparent conflicts. The question is simply whether, under the
 21 circumstances of a particular case, there is a “reasonable possibility” that the prosecutor’s ability
 22 to exercise his authority in a fully independent manner has been compromised.

23 In his opening brief, defendant Nosal called the Court’s attention to a truly extraordinary
 24 factual matter that distinguishes this case from all others cited by the government. This is not
 25 simply a matter in which the line attorney assigned to this matter, Kyle Waldinger, is now
 26 serving under a supervising official, United States Attorney Joseph Russoniello, who once
 27 represented the defendant in this same matter. Rather, as Mr. Nosal asserted and the government
 28 does not dispute, AUSA Waldinger met and discussed with Mr. Russoniello this very matter

1 while Mr. Russoniello was representing Mr. Nosal. This is thus a case in which Mr. Waldinger
2 has indeed communicated with the disqualified counsel, Mr. Russoniello, about the matter at
3 hand, albeit before the conflict arose, a factor apparently absent from all of the precedents on
4 which the government relies. Whether those communications give rise to an appearance of
5 conflict or an actual conflict is largely an academic debate; the fact is that those contacts have
6 compromised the ability of Mr. Waldinger to function independently and impartially in this
7 matter.

8 Furthermore, as noted above, we now have the remarkable claim by counsel for Ms.
9 Christian of her entitlement to have Mr. Waldinger present her anticipated testimony against Mr.
10 Nosal at trial. A defendant has a right to an unbiased prosecutor who will fairly appraise the
11 strength of his case. As a consequence, a prosecutor must maintain an appropriate distance from
12 his witnesses, constantly evaluating the credibility of their testimony dispassionately, as he must
13 be willing to dismiss a matter if he concludes that he cannot prove guilt beyond a reasonable
14 doubt. *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 267 (Because the prosecutor
15 enjoys "broad discretion" to charge, try and dismiss cases, "the public he [or she] serves and
16 those he [or she] accuses may justifiably demand that he [or she] perform his [or her] functions
17 with the highest degree of integrity and impartiality, and with the appearance thereof.") Ms.
18 Christian's insistence on a right as a witness against Mr. Nosal to have Mr. Waldinger in
19 particular prosecute the defendant undermines any presumption that Mr. Waldinger has
20 maintained the objectivity required to assess the credibility of this witness.

21 To the extent that this Court rules, contrary to *Connor* and *Eubanks*, that Mr. Nosal must
22 make some specific factual showing of "actual conflict," Mr. Nosal should be given an
23 opportunity to do so. At this point, Mr. Nosal has no way to know (1) the precise content of the
24 communications between Mr. Russoniello and Mr. Waldinger during their pre-indictment
25 negotiations; (2) what (if any) screening steps the prosecutor's office has taken;² or (3) the

26
27 ² See also Christian Opposition at 3 ("Ms. Christian, of course, is not in a position to
28 know or describe the internal screening steps taken by the Department of Justice to ensure that
Mr. Russoniello has been appropriately 'walled off' from this matter.").

1 dealings between Mr. Waldinger and counsel for Ms. Christian that have led the latter to insist
 2 that defendant Nosal be prosecuted by the former. If the resolution of Mr. Nosal's motion
 3 depends on a finding of "actual conflict" or lack thereof, then this Court would be required to
 4 undertake some inquiry to determine what screening procedures the prosecution has
 5 implemented.

6 Relatedly, the government argues that should Mr. Nosal raise any new argument
 7 regarding actual prejudice, it must be given a chance to respond in a sur-reply filing. (Govt.
 8 Memorandum at 20.) If the government has additional legal authority or factual evidence that
 9 would illuminate the question at hand, Mr. Nosal certainly welcomes its submission.

10 **D. Separation of Powers**

11 Finally, the government suggests that disqualifying AUSA Waldinger would be
 12 unconstitutional because it would violate the separation of powers doctrine. That argument is
 13 makeweight. If the government's argument were true, courts have no authority to manage their
 14 own affairs, including regulating litigants who appear before them. *See Chambers v. NASCO,*
 15 *Inc.*, 501 U.S. 32, 43 (1991). But they surely do possess that power, including the power to
 16 enforce ethics rules. *See, e.g., Whitehouse v. United States Dist. Court*, 53 F.3d 1349, 1366 (1st
 17 Cir. 1995); *United States v. Lopez*, 4 F.3d 1455, 1461 (9th Cir. 1993); *United States v. Klubock*,
 18 832 F.2d 664, 667 (1st Cir. 1987) (en banc); *see also Paul E. Iacono Structural Engineer, Inc. v.*
 19 *Humphrey*, 722 F.2d 435, 438 (9th Cir. 1983) ("[T]he regulation of lawyer conduct is the
 20 province of the courts . . .").

21 It is true that for a time in the late 1980s and early 1990s, the Department of Justice took
 22 the dubious and controversial position that courts lacked the power to require federal prosecutors
 23 to comply with local rules,³ but that position was explicitly repudiated with the Citizens
 24

25
 26 ³ The argument was made most infamously in the "Reno Rule," a regulation promulgated
 27 by the Attorney General in 1994. *See Communications With Represented Persons*, AG Order
 28 No. 1903-94, 59 Fed. Reg. 39,910 (1994). It argued, among other things, that separation of
 powers doctrine allowed federal prosecutors to exempt themselves from state ethics rules and
 local court rules. *Id.* at 39,917.

1 Protection Act of 1998, *codified at* 28 U.S.C. § 530B. *See* Fred C. Zacharias & Bruce A. Green,
 2 *The Uniqueness of Federal Prosecutors*, 88 Geo. L.J. 207, 211-15 (2000) (discussing the
 3 legislative history of the CPA). The CPA states forcefully that federal prosecutors “shall be
 4 subject to State laws and rules, and local Federal court rules, governing attorneys in each State
 5 where such attorney engages in that attorney's duties, to the same extent and in the same manner
 6 as other attorneys in that State.” 28 U.S.C. § 530B(a).

7 If the governing ethical rules prescribe disqualification, then this Court has the power to
 8 order disqualification. If the rules do not prescribe disqualification, then this Court does not
 9 have the power to order disqualification. Invoking separation of powers doctrine does nothing to
 10 illuminate the analysis. This case is no place to debate the theory of the “unitary executive.”

11 CONCLUSION

12 For the reasons stated, the superceding indictment must be dismissed and the entire
 13 United States Attorney’s Office for the Northern District of California, including AUSA
 14 Waldinger, must be recused from further participation in the matter.

15 Dated: November 10, 2008

Respectfully submitted,

16
 17 /s/ Steven F. Gruel
 STEVEN F. GRUEL

18 Attorney for Defendant
 19 DAVID NOSAL
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